80-249

Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

No.....

JOHN V. SCHARA and
MARDELL SCHARA,
Petitioners,

—vs—

THE ANACONDA COMPANY
a Deleware corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF MONTANA

PETITION FOR WRIT OF CERTIORARI

with Appendix

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QUESTION PRESENTED FOR REVIEW

Section 70-30-102 Montana Codes Annotated (MCA), attached hereto, permits the taking of land by eminent domain for public use. It provides in part that mining is a public use except for the open pit mining of coal. The question presented is:

Whether Section 70-30-102 MCA violates the Fourteenth Amendment of the United States Constitution in that it creates an unreasonable classification against landowners whose land is subject to condemnation by private companies engaged in open pit mining of minerals other than coal and thus violates the equal protection clause of the Fourteenth Amendment.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

No. _____

JOHN V. SCHARA and
MARDELL SCHARA,

Petitioners,

—vs—

THE ANACONDA COMPANY,
A Delaware corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

OPINION BELOW

The opinion of the Supreme Court of the State of Montana is unreported and is printed in Appendix A hereto, infra page 10. The judgment of the District Court for the Second Judicial District of the State of Montana is printed in Appendix A hereto, infra page 31.

STATEMENT OF JURISDICTION

The appeal hereto is from a final judgment, opinion or order of the Montana Supreme Court requiring that a judgment of condemnation be entered against Petitioners, and holding in part that Section 70-30-102 MCA does not violate the equal protection clause of the United States Constitution. This petition is based on a final decree of the Montana Supreme Court entered on May 21, 1980.

The jurisdiction of this court is invoked on the grounds that Section 70-30-102 MCA violates the equal protection clause of the Fourteenth Amendment. The Supreme Court has jurisdiction to review this Petition for a Writ of Certiorari under 28 U.S.C. 1257 (3), 2101(c) and 1651(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute of the State of Montana involved is Section 70-30-102 MCA, Enumerated Public Uses, (see Appendix B attached hereto, infra page 33).

The pertinent portion of 70-30-102 states:

> "Subject to the provisions of this chapter the right of eminent domain may be exercised in behalf of the following public uses:
>
> ★ ★ ★
>
> (15) to mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title is vested in others. However, the use of the surface for strip mining or open pit mining of coal (i.e. any mining method or process in which the strata or overburden is removed and is placed in order to extract coal) is not a public use and eminent domain may not be used."

The Montana Supreme Court held that the quoted portion was not a violation of the equal protection clause, Section 1 of the Fourteenth Amendment of the United States Constitution, (see Appendix B hereto, infra page 33), but Petitioners contend to the contrary and invoke this court's jurisdiction on this basis.

STATEMENT OF THE CASE

The Anaconda Company filed proceedings in state court to condemn Petitioners' land under the challenged portion of the Montana statute. The District Court held for the Petitioners on other grounds and it declined to rule on the constitutional question raised in the Petitioners' Findings of Fact and Conclusion of Law submitted to the state District Court. The state District Court stated in its Findings of Fact and Conclusions of Law filed on April 20, 1979, that:

> "(7) Not having the necessary parties before it, this court need not rule on the constitutionality of Section 70-30-402 MCA or any

part or portion thereof, said sections, subdivisions (5) and (15) therefore grant the plaintiff the right of eminent domain."

On appeal to the Montana Supreme Court the State Attorney General was notified of the constitutional challenge of 70-30-102 pursuant to 24(c) of the Montana Rules of Civil Procedure. The state high court reversed the District Court and remanded the case directing a judgment of condemnation to be entered. The Supreme Court said as to the constitutional question raised in the Petitioners' brief to it that:

"The legislature has provided its basis for the distinction between copper and coal mining in Section 70-30-106 MCA which provides:

'70-30-106 *Eminent Domain not to be used for coal mining in certain cases—policy.* For the following reasons the state's power of eminent domain may not be exercised to mine and extract coal owned and located beneath the surface of property where the title of surface is vested in others;

1) Because of the large reserves and renewed interest in coal in eastern Montana, coal development is potentially more destructive to land and water courses and underground aquifers and potentially more extensive geographically than the foreseeable development of other ores, metals or minerals and affects large areas of land and large numbers of people.
2) In many areas of Montana set forth in (1) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and the surface owner is putting the surface to productive use, and it is public policy of the state to encourage and foster such productive

use by such owner and to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines and is also contrary to public policy as set forth in subsection (4).

3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain.

4) It is the public policy of the state to encourage and foster diversity of land ownership and the surface mining of coal and control of large areas of land by surface mining industry would not foster public policy or further public interests.'

Based on the immediately preceding legislative policy we find a reasonable basis for the distinction between copper and coal mining. We conclude that Section 70-30-102 (15) does not violate the equal protection clause."

Petitioners contend this holding is erroneous and that the statute violates the equal protection clause.

REASONS FOR GRANTING THE WRIT

THE DISTINCTION MADE BY THE MONTANA STATUTE SECTION 70-30-102, MCA BETWEEN OPEN PIT MINING OF COAL AND OPEN PIT MINING OF OTHER MINERALS IS INVALID BECAUSE IT DENIES MONTANA LAND OWNERS THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

This court has held that "when legislation applies to particular bodies or associations, imposing on them additional liabilities, it is not open to objection that it denies them equal protection of the laws, if all

persons brought under the influence are treated alike under the same conditions." *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89, 94.

It is in this context that Petitioners contend 70-30-102 is unconstitutional because it violates Section 1 of the Fourteenth Amendment. They are members of a class constituted as Montana Landowners who own surface rights and who have minerals underlying their land owned by others. Yet all persons in this class are not subject to being condemned and thus are not treated equally. The Petitioners' land is subject to condemnation because it is needed for open pit copper mining, while a freeholder in eastern Montana is not subject to condemnation simply because the mineral underlying his land is coal.

The distinction drawn by the legislature is purely arbitrary. Up until 1973, Section 70-30-102 applied equally to all types of mining. The Montana legislature changed the law in that term to the present statute. Such change is purely arbitrary in that it does not treat all Montana land owners equally as far as condemnation is concerned. In *Timble* v. *Gordon*, 430 U.S. 762, where a state law not allowing illegitimate children to inherit from their father was struck down as denying equal protection, this Honorable Court held:

> "A statutory classification must bear some rational relationship to a legitimate state purpose."

In this case there is nor such rational relationship to a state purpose. Section 70-30-106 of the MCA, which is set forth in full in this Statement of the Case, states the policy why eminent domain does not apply to open pit coal mining. As pointed out by Associate Justice Sheehy of the Montana Supreme Court in his dissent, these reasons apply equally well to open pit copper mining. The Montana legislature failed to recognize such fact.

The state cannot treat landowners within the state differently when the same reasons for denying the right of eminent domain apply to all landowners. The Supreme Court has made this quite clear. It has stated:

> "The clause denies the states 'the power to legislate that different treatment be accorded to persons placed by statute into different classes on criteria wholly unrelated to the objective of that statute.' (citation omitted) 'A classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of legislation so that all persons similarly situated are treated alike.' "

Stanton v. *Stanton,* 421 U.S. 7, 13, 14 (struck down a law making different age of majority for boys and girls as denying equal protection.) See also *Old Dearborn Distributing Co.* v. *Segrams Distillers Corp.,* 299 U.S. 183. As pointed out above, 70-30-102 formerly applied to all types of mining and thus treated all landowners in Montana equally. The distinction now drawn by the legislature denies similarly situated land owners the equal protection of the laws. That is to say, a landowner with surface rights over copper or other metals is subject to being condemned, but a surface owner over coal cannot be condemned.

This court has held where all persons engaged in the same business are treated alike and subject to similar regulation there is no discrimination. See *Soon Hing v. Crowley,* 113 U.S. 703 where a regulation not allowing laundries within the city limits to operate at night was upheld as constitutional. But what would have been the decision if a laundry in western Montana could not operate at night while one in eastern Montana could do so? We submit the law would have been struck down.

In the present case unequal treatment runs rampant. While two different companies may be engaged in the business of mining by open pit process, the copper company can condemn the freeholders in its area while the freeholder in the coal company area is insulated from such economic threat. Such is clearly a denial of equal protection to the condemned freeholder.

The Respondent has argued in this case based on *Sutter County v. Nichols*, ____Cal.____ 93 P. 872 that the legislature has the power to encourage the production of a mineral where it is a matter of public importance and thus eminent domain would advance such premise. Coal is at least equal to, if not more a matter of public importance that copper in this time of energy shortage. The production of copper or other hard rock minerals thus is unfettered, and to the landowner subject to condemnation such threat is devastating and unfair. See: *Southern Railway Co.* v. *Green*, 216 U.S. 400.

By the simple fortune or misfortune that copper and not coal lies under Petitioners' land, they are subject to having it condemned and thus thwarted in negotiating privately for its purchase while other Montana freeholders similarly situated approach the negotiations on an equal basis with the coal company. Yet the policy reasons given for the distinction apply equally well to both coal and copper open pit mining. As set forth by this court and as reflected in Montana law in *In re Valley Center Drain District*, 64 Mont. 554, 211 P. 218, to meet the test of whether equal protection is provided a distinction must not be arbitrary or unreasonable and must accord all persons within a particular category equal rights and privileges. As shown by the foregoing facts, Section 70-30-102 does not meet these standards and

therefore denies the Petitioners equal protection of the law.

The relief sought here is available in no other court. The state appeals process as been exhausted. If this Petition is not granted Petitioners have no other formal relief.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition For Writ Certiorari should be granted.

JOHN L. PETERSON

JOHN L. PETERSON
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Butte, Montana 59701

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, John L. Peterson, Attorney for the Petitioners in the foregoing action, hereby certify that on the 18th day of August, 1980, I caused to be mailed in the United States mail, postage prepaid, a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI, addressed to:

Urban L. Roth
Attorney at Law
P. O. Box 396
Butte, Montana 59701

Michael Greeley
Attorney General
State of Montana
State Capitol, Room 225
Helena, Montana 59601

JOHN L. PETERSON

John L. Peterson

APPENDIX A

No. 14829

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1980

JOHN V. SCHARA and MARDELL SCHARA,

Plaintiff and Respondents and
Cross-Appellants,

—vs—

THE ANACONDA COMPANY,
a Delaware corporation,

Defendant and Appellant.

No. 14800

THE ANACONDA COMPANY,

Relator,

—vs—

THE HON. JAMES D. FREEBOURN,
DISTRICT JUDGE PRESIDING
IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT et al.,

Respondents.

Appeal from: District Court of the Second Judicial District, In and For the County of Silver Bow
Honorable Judge James D. Freebourn and Honorable Judge Arnold H. Olsen presiding.

Counsel of Record:

For Appellant:
Poore Law Firm, Butte, Montana
Urban L. Roth argued, Butte, Montana

For Respondent:
McCaffery and Peterson, Butte, Montana
John L. Peterson argued, Butte, Montana

Submitted: February 28, 1980
Decided: April 24, 1980

Filed: April 24, 1980

Thomas J. Kearney, Clerk

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

This is an appeal in which two actions have been consolidated. The first is a condemnation action brought by The Anaconda Company (Anaconda) to condemn approximately two acres of land in the

Columbia Gardens Addition of Butte, Montana. The property sought to be condemned is owned by John and Mardell Schara (Scharas). The second is an action brought by the Scharas to enjoin Anaconda from allegedly violating the conditions of a restrictive covenant incorporated in deeds to lots in the Columbia Gardens Addition. Both actions were filed in the Silver Bow County District Court.

In the first action, the District Court entered incomplete findings and was thereafter directed by this Court to complete such findings.

In the second action, the District Court granted a mandatory permanent injunction enjoining Anaconda from violating the restrictive covenant which has attached to the Scharas' property. Anaconda moved for a stay of the injunction, but the motion was denied by the District Court. This Court granted Anaconda a temporary stay pending determination of the merits of this appeal.

Anaconda appeals from both District Court judgments, and the Scharas cross-appeal from the judgment entered in the condemnation action.

John and Mardell Schara are the owners of approximately 2.2704 acres of land, Lots 51, 52 and 54 of the Columbia Gardens Addition in Butte, Montana. On September 1, 1978, the Columbia Gardens Addition was incorporated under the Master Zoning Plan for Butte-Silver Bow and was zoned "M" for mining or industrial. Most of the 26 acres and the entire mineral estate within the Addition is owned by the Anaconda Company. The only access to the Scharas' property and the Addition is Montgomery Avenue. Anaconda owns all of the land adjacent to Montgomery Avenue on both sides, plus all of Montgomery Avenue to the Columbia Gardens Addition. At the present time, the Scharas are the sole residents of the Addition. Since 1970, the Addition and its immediate neighborhood have undergone extensive

changes, most of which have been prompted by Anaconda. The Columbia Gardens Amusement Park has been razed, the Continental East Pit operation located 300 to 400 feet from the Addition has commenced, an interstate highway has been constructed through the southeast corner of the Addition, the Berkeley Pit has expanded and a power line has been constructed through the north end of the Addition. The Anaconda Company has, upon several occasions, attempted to acquire the Scharas' property through negotiation and offers to purchase.

Anaconda instituted a condemnation proceeding against the Scharas to acquire their land for the purpose of establishing a dumping site for mining waste. In support of its claim, Anaconda presented evidence that it wished to expand its mining operations, that the expansion would require new techniques and expensive equipment, that it would be economically infeasible and impractical to dump waste on any other land, and that the land was essential to carrying out Anaconda's long term mining plan. Anaconda's testimony reveals that if the land is not acquired it would be infeasible to expand the Berkeley Pit eastward; consequently, mining would terminate within seven years due to exhaustion of the pit, shortening the life of mining in Butte by 14 years. Anaconda's mining plan requires that Montgomery Avenue as well as the Columbia Gardens Addition be inundated by overburden by the mid-1980's. The Scharas presented contradictory evidence of alternative dumping sites which were not as economically feasible for the mining operation but which were being contemplated by Anaconda if the Scharas' land could not be obtained. The Scharas also proffered testimony that Anaconda has made inconsistent statements concerning future mining operations in its petition fro the Woodville Road closure in 1977. Anaconda had stated at that time

that with the road closure it could continue mining until about year 2000.

In the second action, the Scharas sought to enjoin Anaconda from violating one of the restrictive covenants placed upon their property. The covenant was the result of a trust agreement signed in 1950 between North Butte Mining Company, Anaconda's predecessor in interest, and all of the owners of Columbia Gardens Addition, one of whom was the Scharas' predecessor in interest. The trust instrument bound successors in interest and provided:

> "That in all conveyances, uses or permits there shall be a restriction upon the use of said premises that said premises shall be for residential use only and that no building, use or operation of the premises shall create or constitute a nuisance."

The District Court denied Anaconda's motion to stay the restrictive covenant proceedings until the outcome of the condemnation action, and Judge Olson entered judgment against Anaconda on March 28, 1979. Pursuant to this judgment, a permanent injunction was issued which restrained Anaconda from using its property within the Columbia Gardens Addition fro any purpose other than residential and from creating or maintaining a nuisance. The injunction also commanded Anaconda to remove an electric transmission line from the Addition and to repair or remove all vacated buildings located upon its property within the Addition.

Originally the District Court, in the condemnation action, the Honorable James D. Freebourn presiding, made the following findings of fact and conclusions o law on April 19, 1979:

> "5. at this date, plaintiff has nearly reached the maximum depth at which ore can be economically mined from the pit; the pit must be expanded horizontally in one direction or another; de-

fendants' property lies east and south of the pit; expansion to the east and south, instead of some other direction, is compatible with the greatest public good and least private injury;

"...

"10. Plaintiff's past, present and continuation of future operations have and will accure as a benefit to the public and to the use of the public Acquistion of lots 51, 52 and 54 of the Columbia Garden Addition, on substantial and satisfactory estimations, now in evidence, will continue plaintiff's operations for some 13 or more years.

"11. Plaintiff has shown, by a preponderance of the evidence, that the use and taking of said lots is authorized by law; that the taking of said lots is necessary to such use; that the need of said lots is necessary to continue plaintiff's mining operations and such taking, at this definite and specific location, is being accomplished in a manner which will be most compatible with the greatest public good and the least private injury."

However, the court took judicial notice of the permanent injunction issued on March 30, 1979, by the Honorable Arnold H. Olsen in favor of the Scharas and against Anaconda concerning the violation of restrictive covenants in the Columbia Gardens Addition. As a result, Judge Freebourn refused to enter a condemnation award until this Court reviewed the permanent injunction since such an award would amount to a reversal of Judge Olsen's injunction.

Subsequently, Anaconda sought a writ from this Court to direct Judge Freebourn to complete his findings and conclusions. On July 11, 1979, this Court directed the District Court to enter those conclusions. Judge Freebourn then made "amended and supplemental" findings of fact and conclusions of

law in which he held that Anaconda had "more than sufficient land for dumping purposes and to continue its mining operations for some 14 or 15 years without the need and necessity of the use of defendants' land," and further found that Anaconda's need for the Scharas' property would not arise for some "14 or 15 years" in the future. The District Court then concluded Anaconda had failed to prove its need of the Scharas' property in the immediate future and because of increases in land values over the last five years, the present taking of the Schara property for "some 14 or 15 years in the future, would deny defendants just compensation fro such use."

The following issues are before us on appeal:

(1) Whether the District Court was in error by denying Anaconda's motion to stay the restrictive covenant action until a final determination of the condemnation action;

(2) In the alternative, whether the restrictive covenant is unenforceable due to the radical changes which have occurred in the Columbia Gardens Addition since 1950;

(3) Whether the District Court abused its discretion by not having substantial evidence upon which to base its findings that no "necessity" will exist for Anaconda to condemn the Scharas' property for 14 or 15 years.

The Scharas raise the following issues on cross-appeal:

(1) Whether the proposed condemnation is excessive;

(2) Whether, by reason of the Hardrock Mining Act, a valid mining permit is an absolute condition precedent to condemnation fro mining purposes;

(3) Whether section 70-30-102, MCA, which distinguishes between copper mining and coal

mining as a public use, is unconstitutional under the Equal Protection Clause.

Looking first to Judge Olsen's denial of Anaconda's motion to stay the covenant action pending the outcome of the condemnation proceedings, the heart of this issue is the effect that a restrictive covenant has upon a proceeding seeking a preliminary condemnation award.

Nichols on Eminent Domain discusses the issue as follows:

"5.73 *Restrictive covenants.*

"A rather perplexing situation arises out of the existence of what are commonly called 'building restrictions.' A large tract of land is often cut up into lots and sold for residential purposes, and each lot is sold subject to restrictions against use for various purposes, the restriction upon each lot being for the benefit of all other lots in the same development or 'common plan or scheme,' reasonable in their character, they are enforced by courts of equity in favor of the benefitted owner, so lang as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to disregard the restrictions. *Such restrictions do not, however, have an inhibiting influence upon the right to exercise the power of eminent domain . . .*" (Emphasis added.) Nichols on Eminent Domain, §5.73.

This approach is consistent with Montana eminent domain statutes. Section 70-30-103, MCA, provides that all real property as well as all classes of private property may be taken for public use when such taking is authorized by law, and section 70-30-104,

MCA, states that "such estate or rights as may be necessary up to and including a fee simple when taken . . . for a place for the deposit of debris or tailings of a mine . . ." are ". . . subject to be taken for the public use."

In our present appeal, the restrictive covenant is at most a part of the fee or something less than a fee. Therefore, it is the proper subject of a condemnation proceeding. Once it is determined that the property sought is a proper subject of condemnation, the court must find that the taking is necessary to the public interest and consistent with the greatest public good and the least private injury.

We therefore conclude that a restrictive covenant action is moot when a preliminary condemnation action involving the same property is pending. If it is found that a preliminary condemnation award is proper, the condemnee may seek compensation which takes into account the value of the property pursuant to the uses allowed. On the other hand, if the condemnor is not entitled to a preminary condemnation award, the covenantee may proceed with a suit on the restrictive covenant.

The District Court was in error by not granting the motion to stay the restrictive covenant proceeding until the property of the condemnation action was finally determined.

Since we find the restrictive covenant action moot, we need not reach the issue involving the unenforceability of a covenant when radical changes have occurred in the character of a neighborhood.

Next, with regard to the propriety of the District Court's denial of a preliminary condemnation order, it is Anaconda's contention that substantial credible evidence does not exist to support the finding of no necessity for condemnation.

Section 70-30-111, MCA, is entitled *"Facts necessary to be found before condemnation."* It

provides, in pertinent part, ". . . [b]efore property can be taken, it must appear: (1) that the use to which it is to be applied is a use *authorized by law;* (2) that the taking is necessary to such use . . ." Section 70-30-110, MCA, states that the proposed condemnation "must be located in the manner which will be most compatible with the greatest public good and the least private injury."

From the preceding statutes the key determinations to be made ae: (1) Whether the proposed use is "authorized by law," (2) whether "the taking is necessary", and (3) whether the location is the "most compatible with the greatest public good and the least private injury."

The determination involving whether the proposed use is "authorized by law" is easily made. Section 70-30-102, MCA, enumerates the public uses which are the proper subject of condemnation and therefore "authorized by law." Mining, except the strip mining of coal, is an authorized public use within section 70-30-102(15), MCA.

The determinations of whether the taking is necessary and whether it is compatible with the greatest public good and the least private injury both involve factual issues.

With regard to whether the taking is necessary, this Court has consistently held that the necessity need not be absolute. Instead the test is "reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case." Montana Power Co. v. Bokma (1969), 153 Mont. 390, 398, 457 P.2d 769, 774; State Highway Commission v. Yost Farm Co. (1963), 142 Mont. 239, 384 P.2d 277; Butte, A. & P. Ry. Co. v. Montana U. Ry. Co. (1895), 16 Mont. 504, 41 P. 232.

This Court made the following statement with regard to the determination of "necessity" and "the

greatest good" and the "least private injury" in Montana Power Co. v. Bokma, supra.

> "The taking of private property by condemnation proceedings must be compatible with the greatest public good and the least private injury . . . The greatest good on the one hand and the least injury on the other are questions of fact to be determined in passing upon the question of necessity . . . These questions commonly arise in connection with the location of the proposed improvement. Since the condemnor has the expertise and detailed knowledge of considerations involved in determining location of the improvement, its choice of location is given great weight . . . Such choice will not be overturned except on clear and convincing proof that the taking has been excessive or arbitrary, it not being the function of the judiciary to determine as an engineer the best location of the proposed improvements . . . On the other hand when the condemnor fails to consider the question of the least private injury between alternate routes equal in terms of public good, its action is arbitrary and amounts to an abuse of discretion." (Citations omitted.) 153 Mont. at 399-400, 457 P.2d at 774-775.

According to the above approach the condemnor's (Anaconda's choice of location is to be given great weight, it is to be overturned only by clear and convincing proof that the decision was excessive or arbitrary, and an abuse of discretion will be found if the condemnor fails to study alternatives. The record discloses that Anaconda studied all alternatives and rejected them as being economically infeasible. The District Court in its original findings found that Anaconda had "shown, by a preponderance of the evidence that the . . . taking is necessary . . .and will be most compatible with the greatest public good

and the least private injury." Mysteriously, in the court's amended and supplemental findings of fact and conclusions of law, the original findings remain intact, but the following inconsistent finding is added:

> "Plaintiff has failed to prove by a preponderance of the evidence the need and necessity of plaintiff for the use for mining of defendants' land in the immediate future and such need and necessity will not arise for some 14 or 15 years in the future."

Normally, the entry of inconsistent findings would require us to remand the case for further proceedings in the District Court; however we find no evidence to support the court's latest findings and substantial evidence to support the initial findings. We concluded that the findings entered by the District Court on April 9, 1979, are correct and must be entered.

The record does disclose that mining in the present Berkeley Pit will be completed in 1986. In order to increase the life of future mining in Butte the Berkeley Pit must be expanded, and according to Anaconda's long term mining plan stripping of overburden must commence by 1983. Anaconda explains that new technology has been developed for removing overburden, and in order to have the equipment on line by 1983, immediate action is required. The equipment requires a tremendous investment and Anaconda must have know the result of the condemnation action before it can be ordered.

It is further disclosed that Anaconda considered two alternatives to the condemnation of the Scharas' property. One alternative was backfilling the Berkeley Pit with overburden. This alternative was rejected since the long term mining plan contemplates vertically mining ore deposits located beneath

the deepest portion of the Berkeley Pit. This future vertical mining plan is not now feasible because of both a lack of technology and current market conditions; however, it would be completely precluded if Anaconda backfilled the pit. The second alternative studied by Anaconda was the establishment of a dumping site on a portion of its own land. Testimony reveals that although this alternative is feasible from an engineering standpoint, it is economically infeasible to transport the waste the distance involved. This leaves condemnation of the Scharas' land as the only feasible alternative to continue the life of mining in Butte.

The Scharas contend that since the preceding alternatives exist, condemnation of their land is not "necessary" nor "compatible with the greatest public good and the least private injury." We find this contention lacking in merit in light of Montana Power Co. v. Bokma, supra.

As a result, we find substantial credible evidence to support the findings entered by the District Court on April 19, 1979.

The Scharas contend on cross-appeal that the amount of property sought to be condemned is excessive. The basis for this argument is that Anaconda has recognized in its mining plan that a portion of the Scharas' land is within the Highway Department's proposed right-of-way for expansion of Interstate 15 and that Anaconda only contemplates use of the Scharas' property up to the proposed highway right-of-way.

Again this argument centers on absolute necessity, rather than the Montana test of necessity, "reasonable, requisite and proper for the accomplishment of the end in view, under the particular circumstances of the case." Montana Power Co. v. Bokma, supra. Testimony reveals that Anaconda

would not use a small portion of the Scharas' land within the proposed highway right-of-way if the Highway Department does acquire it. Based on this testimony we cannot find that the proposed condemnation is excessive merely because Anaconda points out to the District Court that the Highway Department may have a superior claim to a small portion of the land. We find that condemnation of the Scharas' property is reasonable, requisite, and proper for the accomplishment of the end in view under the peculiar circumstances of the case. The possibility that Anaconda may have to forfeit a small portion of the land to a superior claimant at a later date does not render the taking excessive.

The Scharas next contend on cross-appeal that since section 70-30-111, MCA, requires the use to be "authorized by law" before condemnation is allowed, the obtaining of a valid mining permit is a condition precedent to condemnation. However, there is nothing in either the Hardrock Mining Act, section 82-4-301, MCA, et seq., or the eminent domain statutes, section 70-30-101, MCA, et seq., to support this position. Section 70-30-102, MCA, declares mining to be a public use and it is unquestioned that Anaconda is allowed to engage in mining activities. To find that "authorized by law" requires that a mining company obtain a valid mining permit prior to condemnation would be inconsistent with Montana statutory authority and would be contrary to the public policy of providing expediency in eminent domain proceedings.

The Scharas' next issue on cross-appeal is that section 70-30-102(15), MCA, is unconstitutional. The statute provides, in pertinent part:

> "*Public uses enumerated.* Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: . . ."

"(15) to mine and extract ores, metals, or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others. *However, the use of the surface for strip mining or open pit mining of coal* (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) *is not a public use, and eminent domain may not be exercised for this purpose . . .*" (Emphasis added.)

It is contended that since the statute allows the mining of copper to be a public use and disallows the strip mining of coal as a public use, there is an unconstitutional violation of the Equal Protection Clause. However, it is well established that the equal protection clause is very limited in cases involving eminent domain statutes. This is especially so when the statute merely declares the legislative determination as to what is to be considered a public use. All that is required to survive an equal protection challenge in this context is that there be a "reasonable" basis for the distinction. Nichols on Eminent Domain, §4.15.

The legislature has provided its basis for the distinction between copper mining and coal mining in section 70-30-106, MCA, which provides:

"70-30-106. *Eminent domain not to be used for coal mining in certain cases—policy.* For the following reasons the state's power of eminent domain may not be exercised to mine and extract coal owned by the plaintiff located beneath the surface of property where the title to the surface is vested in others:

"(1) Because of the large reserves of and the renewed interest in coal in eastern Montana, coal

development is potentially more destructive to land and watercourses and underground aquifers and potentially more extensive geographically than the forseeable development of other ores, metals, or minerals and affects large areas of land and large numbers of people.

"(2) In many areas of Montana set forth in (1) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and the surface owner is putting that surface to a productive use, and it is the public policy of the state to encourage and foster such productive use by such owner, and to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines and is also contrary to public policy as set forth in subsection (4).

"(3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain.

"(4) It is the public policy of the state to encourage and foster diversity of land ownership, and the surface mining of coal and control of large areas of land by the surface coal mining industry would not foster public policy and further the public interest."

Based upon the immediately preceding legislative policy we find a reasonable basis for the distinction between copper mining and coal mining. We conclude that section 70-30-102(15) does not violate the Equal Protection Clause.

The judgments of the district Court in both actions are reversed. Thje restrictive covenant action is dismissed. The condemnation action is remanded to the District Court for entry of judgment of condemnation in accordance with this opinion.

Frank I. Haswell
Chief Justice

We concur:

Gene B. Daly
John Conway Harrison
Daniel J. Shea
Justices

Mr. Justice John C. Sheehy dissenting:

At the base of this Court's decision and that of Judge Freebourn in the condemnation action was the contention of the Anaconda Company that unless the Schara property were acquired by the company, the company's mining operations would be reduced from 20 years in the Butte area to 6 to 7 years of active life and we are told "this obviously would be disastrous for the public good of Butte-Silver Bow, Deer Lodge Counties and the State of Montana."

The closing threat is not new. It seems to me that I have heard this song before. It is from an old familiar score. We can only be sure that the decision to go or remain will not be dependent on the Schara property.

Judge Freebourn, when this Court forced him by mandate to make final findings of fact and conclusions of law so as to override Judge Olsen's restrictive covenant decision, found that "for dumping purposes" and to continue its mining operations for some 14 or 15 years, Anaconda has sufficient land already. Therefore he saw no need for the Schara property until some 14 or 15 years in the

future and concluded that to permit condemnation now would deny them just compensation for the use of their land.

Although Rule 52, M.R.Civ.P. makes it mandatory that findings of a District Court shall not be set aside unless clearly erroneous, this Court through the majority opinion not only sets Judge Freebourn's findings aside, but proceeds to make findings of its own. There is ample support in the record that the Anaconda Company owns a considerable area of land which could be used for dumping purposes, established in the cross-examination of Wilbur Crisswell. Moreover, Judge Freebourn had before him the testimony regarding the East Continental Pit. The old highway leading to Woodville had been closed to permit the opening of the East Continental Pit, upon the representation that such closing of the highway would extend Butte's mining for 22 years. East Continental Pit was abandoned after 2 years.

As a second point, I cannot permit myself to sign an opinion which finds it "reasonable" for eminent domain power to be granted to open-pit hardrock mining companies, but to be denied to open-pit coal mining companies. Every reason stated for denying eminent domain power to the coal mining industry in section 70-30-106, MCA, applies with equal force to the copper mining industry. There is no real distinction between an open-pit copper mine and an open-pit coal mine, except that the legislature favored cows over people. We give mere lip service to the equal protection clause of the federal constitution when we find a distinction without a difference in section 70-30-106.

For these reasons, I dissent.

John C. Sheehy
Justice

IN THE SUPREME COURT OF THE
STATE OF MONTANA

JOHN V. SCHARA and MARDELL SCHARA,
Plaintiffs and Respondents and
Cross-Appellants,

No. 14829

—v—

THE ANACONDA COMPANY,
A Delaware corporation,
Defendant and Appellant

THE ANACONDA COMPANY,
Relator,

No. 14800

—v—

THE HONORABLE JAMES D. FREEBOURN,
DISTRICT JUDGE PRESIDING IN THE
DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICTS, et al.

Respondents.

ORDER

Filed May 21, 1980
Thomas J. Kearney
Clerk of Supreme Court
State of Montana

The petition for rehearing filed by respondents John V. Schara and Mardell Schara is hereby denied.

DATED this 21st day of May, 1980.

Frank I. Haswell
Chief Justice

Gene B. Daly
Daniel J. Shea
John Conway Harrison
Justices

Justice John C. Sheehy, dissenting:

One of the bases for the petition for rehearing is that this court did not consider the fact that Judge Freebourn had before him as a record the evidence in the condemnation suit, which was tried before him, and also the testimony in the covenant suit which was tried before Judge Olsen. Pursuant to motion, Judge Freebourn had taken judicial notice of the proceedings that had occurred in the covenant suit. Thus the respondent argued, and the records sustained them, that this court, in finding no substantial evidence to support Judge Freebourn's conclusion of law, did not take into consideration and overlooked the fact that the covenant suit testimony was before Judge Freebourn. The least this court should do by way of rehearing is to examine that contention by referring to the transcript not only of the condemnation action, but that of the covenant suit. If indeed in the covenant suit, as petitioners contend, there is substantial (even though conflicting) evidence to support Judge Freebourn's decision, then of course his decision must stand. Since under Rule 52, Montana Rules of Civil Procedure, we have no power to set aside a court's findings unless they are clearly erraneous.

By denying the petition for rehearing, this court forecloses examination of that issue without a hearing.

The condemnor answers this contention by stating that judicial notice is limited to the pleadings and the judgment in the covenant case. No citation of authority is given for that position. By implication, in denying the petition for rehearing, this court give approval to that position, which in itself deserves argument.

There is a good deal more that could be said about the decision of this court in its judgment, and in refusing the petition for rehearing, but the foregoing

suffices to show that the petition for rehearing should be granted.

John C. Sheehy
Justice
Filed May 21, 1980
Thomas J. Kearney
Clerk of Supreme Court
State of Montana

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF SILVER BOW

THE ANACONDA COMPANY,
Plaintiff,

—v—

2.2704 Acres of Land in Butte-Silver Bow,
State of Montana;
JOHN V. SCHARA and MARDELL W. SCHARA,
Husband and Wife; and Unknow Others,
Defendants.

No. 63885

JUDGEMENT

This cause came on for trial before The Honorable James D. Freebourn, and the issues having been tried, and the court having made and entered its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff in accordance

with the court's findings of fact and conclusions of law.

DONE AND DATED this 21st day of August, 1979.

James D. Freebourn
District Judge
Filed August 21, 1979
Dan Bukvich, Clerk
By S.M. McGowan
Deputy Clerk

APPENDIX B

70-30-102. *(Effective as provided in Compiler's Comment under 82-4-202)* Public uses enumerated. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;

(3) public buildings and grounds for the use of any county, city or town, or school district; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys and all other public uses for the benefit of any county, city, or town or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statute or ordinances by which the same may be authorized.

(4) wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water and drainage and reclaiming lands and for floating logs and lumber on streams not navigable and sites for reservoirs necessary for collecting and storing water. However, such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

(5) roads, tunnels, ditches, flumes, pipes, and dum-

ping places for working mines, mills, or smelters for the reduction or ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores; also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water. However, such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

(6) private roads leading from highways to residences or farms;

(7) telephone or electric light lines;

(8) telegraph lines;

(9) sewerage of any city, county, or town or any subdivision thereof, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families or of any public buildings belonging to the state or to any college or university;

(10) tramway lines;

(11) electric power lines;

(12) logging railways;

(13) temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways for such time as the court or judge may determine; provided, the grounds of state institutions be excepted;

(14) underground reservoirs suitable for storage of natural gas;

(15) to mine and extract ores, metals, or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface

vests in others. However, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use, and eminent domain may not be exercised for this purpose;

(16) to restore and reclaim lands strip- or underground-mined for coal and not reclaimed in accordance with Title 82, chapter 4, part 2, and to abate or control adverse affects of strip or underground mining on those lands.

History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Comp. Stat. 1887; amd. Sec. 2211, C.Civ. Proc. 1895 amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1238; re-en. Sec. 9934, R.C.M. 1935; amd. Sec. 1, Ch. 245, L. 1953; amd. Sec. 6, Ch. 259, L. 1955; amd. Sec. 1, Ch. 216, L. 1961; amd. Sec. 1, Ch. 311, L. 1973; amd. Sec. 1, Ch. 375, L. 1974; R.C.M. 1947, 93-9902; amd. Sec. 18, Ch. 550, L. 1979.

CONSTITUTION APPENDIX B

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the united States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a membmer of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor

any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.